Selected Documents from Claim File

Claim No. LRF-1999-0915-02

LRF / CLAIMS CLAIM REPORT **Claim # : LRF-1999-0915-02** **Run Date :03/06/2000**

Claim Amt. : $4,667.30 Initial Entry Date : 09/24/1999
Claimant : Columbia Mechanical Plumbing & Heating
Property Desc. :
Property Addr. : 7175 W 3995 S
West Valley City, UT 84128

STATUS : PENDING (BOARD HEARING)

Comments Page: 001 UserID: kschwab

Lot 15, Branden Place Subdivision

Associated Addresses

Type : Claimant Legal Counsel
DOPL # : - -
Firm Nm :
Name : F Mark Hansen
431 N 1300 W
Salt Lake City, UT 84116

(801) 517-3530

Type : Claimant Address
DOPL # : 22-233795-5501
Firm Nm : Columbia Mechanical Plumbing & Heat
Name : David Barlow
13484 S 7300 W
Herriman, UT 84065

(801) 254-0861

Type : Home Owner - Secondary
DOPL # : - -
Firm Nm :
Name : Michelle Clayton
7175 W 3995 S
West Valley City, UT 84128

( ) -

Type : Home Owner - Primary
DOPL # : - -
Firm Nm :
Name : William Clayton
7175 W 3995 S
West Valley City, UT 84128

( ) -

Type : Non-Paying Party Legal Counsel
DOPL # : - -

Firm Nm : Black Stith & Argyle PC
Name : David O Black
5806 S 900 E

Salt Lake City, UT 74121

(801) 484-3017

Type : Non-Paying Party - Primary

DOPL # : - -

Firm Nm :

Name : PRP Development

7069 Highland Dr STE 250

Salt Lake City, UT 84121

( ) -

DEMOGRAPHIC INFORMATION

Claim #: LRF-1999-0915-02 Claimant: Columbia Mechanical Plumbing &

DOPL Licensee:	yes
Entity Type:	Corporation
Number of Employees:	5-9
Gross Annual Revenue:	0-9K
Years In Business:	50-99
Claiming Capacity:	Subcontractor

NON-PAYING PARTY

DOPL Licensee:	no
Entity Type:	

========== **CLAIMS PROCESSING INFO** ==========

	Date Recieved	Date Forwarded
Front Desk	09/15/1999	09/17/1999
LRF Special-Setup,Filing,CRIS	09/17/1999	09/24/1999
Permissive Party Response	10/25/1999	DEADLINE**********
Screen C/D Letter	09/29/1999	

Comments Page: 001 UserID: ewebster

Conditional Denial Letter send September 28, 1999 with response due date of October 29, 1999.

Reasons for conditional denial:

1. Civil action filed 204 days after last date of qualified services
2. Claim filed 161 days after entry of judgement
3. Amount of qualified services not known
4. Affidavit not notarized

Claimant Response C/D Letter	12/08/1999	10/28/1999

Comments Page: 001 UserID: ewebster

11/05/99: Claimant has not responded to conditional denial letter. Processing claim for denial.

12/08/99: Claimant appealed denial.

03/01/00: Claim remanded back for review. Claimant provided additional documentation to address all conditional denial issues (see Jurisdiction Checklist & Required Factual Findings). Processing claim for payment.

Substantive Review 03/02/2000

Comments Page: 001 UserID: ewebster

Claim is complete and Examiner recommends payment in the amounts shown on the Payment Checklist. Board members are encouraged to read carefully the Jurisdiction Checklist comments and the Stipulation attached with the claim file for explanation of why a claim filed 161 days after judgement entry is being considered as jurisdictionally sound.

03/06/2000

Received amended judgement. Claimant had judgement amended to state an exact amount of attorney fees. Pursuant to Utah Code Ann. 38-11-203(e), claim is amended to include all attorney fees. However, Examiner believes a portion of the fees are invalid (particularly those related to appealing the initial denial) and has asked the Office of Attorney General to provide an opinion.

Claim Disposition Approve 03/02/2000

Comments Page: 001 UserID: kschwab

11/23/1999: Order to David Barlow, qualifier for Columbia Mechanical Plumbing & Heating was returned with a note (not from USPS) "return to sender wrong address for David."

03/02/00: Reprocessing claim per order on appeal.

Board Disposition ***

JURISDICTIONAL CHECKLIST ==========

Completion Of QS	01/16/1998
Civil Bkcy Filing	06/24/1998
Difference	159

Comments Page: 001 UserID: ewebster

Qualified services date per final job time log (pg 40) Note: this time log was not made available until after the conditional denial letter was sent. All previous jurisdiction calculations were based on other documents in the claim.
Civil action filing date per court date stamp (pg 23)

Civil Judg/Bkcy Filing	04/07/1999
LRF App Filing	09/15/1999
Difference	161

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Judgement entry date per judge's signature (pg 29)
Claim filing date per DOPL date stamp (pg 1)

On appeal, DOPL and claimant stipulated that Utah Code Ann. 78-12-41 overrides the 120-day limit imposed in Utah Code Ann. 38-11-204(2) (a copy of the stipulation is attached with the claim record).

In brief, Homeowner defaulted on lien foreclosure proceeding. Therefore, Claimant appeared to have a valid lien. That appearance continued until after the 120-day period had expired. Therefore, Claimant did not file because the claim would have been automatically invalid.

When Claimant attempted to execute against the residence, Homeowners asserted Lien Restriction as a defense. The judge, of his own accord, set aside the foreclosure judgement and decreed Homeowner was protected. Therefore, Claimant could not collect on the lien but had a valid claim. However, this occurred after the 120 days had already expired.

Because Claimant could not file a valid lien until after the 120-day period had expired and because Claimant acted in good faith, DOPL agrees the claim should be processed.

========== **COMPLETE APPLICATION CHECK-LIST** ==========

Form Submitted	Yes	09/15/1999		
Form Completed	Yes	10/26/1999		
Fee	Yes	09/15/1999	9257-61-0011	ICN
Signed Cert/Aff	Yes	10/26/1999		
Cert of Service	Yes	09/10/1999		
Demog. Questionaire	Yes	09/15/1999		

========== **SUPPORTING DOCUMENTS** ==========

Written Contract	Yes	Written Contract	06/14/1997
Licensing Statute	Yes	No License Required	
Full Payment	Yes	Affidavit Ind/Evidence	07/30/1997
Civil Action/Bankrupt	Yes	Complaint	06/24/1998
Entitlement to Pmt.	Yes	Civil Judgment	04/07/1999
Exhaust Remedies	Yes	SO/RS/WE/RE	05/25/1999

========== **REQUIRED FACTUAL FINDINGS CHECK-LIST** ==========

Claimant Qualified Beneficiary **Yes**

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Claimant has held license 22-233795-5501 since sometime prior to 1980. License has been active & in good standing since issuance.

Claimant registered with the Fund January 1, 1995 (ICN 5206-LB-4411). Registration has remained in effect since that date.

Written contract exists **Yes**

Comments Page: 001 UserID: ewebster

Claimant provided copy of Real Estate Purchase Contract executed between Homeowner and NPP (a real estate developer) (pg 16 - 17). The contract is complete and signed by all required parties. Contract is for purchase of a partially completed home upon completion.

Original Contractor Licensed **N/A**

Comments Page: 001 UserID: ewebster

NPP is exempt from licensure as a real estate developer. Claimant provided warranty deed (pg 13) showing NPP maintained ownership of land and residence until sale was closed. Contract (pg 16 - 17) and building permit (pg 21) identify the contractor as Premier Homes, LC (license 93-267042-5501, a B100 general building contractor).

Owner PIF to Contractor **Yes**

Comments Page: 001 UserID: ewebster

Claimant provided complete copy of settlement statement executed between Homeowner and NPP (pg 18 - 19). Statement includes certification by escrow officer that all funds were collected and disbursed as required by contract.

Residence Own/Occ as defined **Yes**

Comments Page: 001 UserID: ewebster

Homeowner provided a complete Owner-Occupied Residence affidavit (pg 10). Affidavit shows construction was completed July 21, 1997 and occupancy began July 26, 1997.

Residence Single Family/Duplex **Yes**

Comments Page: 001 UserID: ewebster

Per Owner-Occupied Residence affidavit and building permit.

Contract For QS **Yes**

Comments Page: 001 UserID: ewebster

Claimant provided contract and invoice showing performance of ground plumbing, rough plumbing, and finish plumbing on the incident residence (pg 50).

Claimant brought Civil Action **Yes**

Comments Page: 001 UserID: ewebster

Summary judgement in favor of Claimant and against NPP was entered April 7, 1999.

Exhausted Remedies **Yes**

Comments Page: 001 UserID: ewebster

Supp Order was issued May 19, 1999 and served on registered agent of NPP May 25, 1999. NPP responded to Supp Order by completing Claimant's interagatories and asserting the company no longer exists and has no assets (pg 30 - 34)

Adequate $ in LRF Fund **Yes**

Statutory Limit/Payment **no**

Comments Page: 001 UserID: ewebster

Total payments for this residence to date: $0

Exceed Monetary Cap **No**

Comments Page: 001 UserID: ewebster

Total payments to Claimant to date: $0

Un-reimbursed Payments **no**

Comments Page: 001 UserID: ewebster

To date Fund has paid $0 of claims on behalf of Claimant and has received $0 of reimbursements.

Claim Number:	LRF-1999-0915-02	NCA Number:	NCA-1998-0717-01	Claim Type:	Informal
Claimant Name:	Columbia Mechanical Plumbing & Heati				
	Jdg. $ Informal / Payable $ Formal	Apportioned % 100.00	CLAIMED	DIFERENCES	
PRINCIPAL AMOUNT	2,485.00	2,485.00	2,571.90	86.90	
ATTORNEY FEES	1,108.10	1,108.10	1,108.10	0.00	
COSTS	143.20	143.20	148.21	5.01	
INT. % 12.00	565.35	565.35	195.58	-369.77	96.10
PRE SUB-TOTAL	1,816.65	1,816.65	1,451.89	-364.76	
ATTORNEY FEES	2,399.05	2,399.05	1,729.05	-670.00	
COSTS	19.28	19.28	23.47	4.19	
INT. % 0.00	0.00	0.00	70.99	70.99	
POST SUB-TOTAL	2,418.33	0.00	1,823.51	-594.82	
TOTAL*******	6,719.98	6,719.98	5,847.30	-872.68	

QUALIFIED SERVICES COMMENT

Comments Page: 001 UserID: ewebster

Judgement declares total qualified services as $5,570.40. That amount relates to two residences. Qualified services amount for this claim per Claimant's contract with and invoice to NPP (pg 50).

PRE JUDGEMENT ATTORNEY FEE COMMENT

Comments Page: 001 UserID: ewebster

Total pre-judgement fees per judgement $2,400.00. Amount for this claim allocated on basis of qualified services.

03/06/00

Fees updated as per amended judgement.

PRE JUDGEMENT COSTS COMMENT

Comments Page: 001 UserID: ewebster

Total pre-judgement costs per judgement $321.00. Costs for this claim allocated on basis of qualified services.

PRE JUDGEMENT INTEREST COMMENT

Comments Page: 001 UserID: ewebster

Per Utah Code Ann. 38-11-203(3)(c) interest calculated at 12% from payment due date to claim processing date net of any delays attributable to the claimant.

DATES USED FOR CLAIM:
DUE DATE: February 13, 1998. Per judgement--interest begins this date.
CONDITIONAL DENIAL: September 29, 1999. Denial was for several items, not just 120-day rule. Therefore, this delay is attributable to Claimant--interest suspended this date.
CLAIMANT APPEAL: December 8, 1999. DOPL ultimately agreed 120-day rule should not have prevented processing of claim. Any further delay is attributable to DOPL not Claimant--interest resumes this date.
BOARD HEARING: March 16, 2000--interest terminates this date.

POST JUDGEMENT ATTORNEY COMMENT

Comments Page: 001 UserID: ewebster

Total post-judgement attorney fees verified by attorney's affidavit (pg 51 - 53): $1,725. All of those fees relate to this claim and are not allocable among related claims.

Utah Admin Rule R156-38-204d(2)(b)(i) limit on total attorney fees is $820.05. Pre-judgement fees are based on a sum-certain amount declared in judgement. Judge allows for augmentation for post-judgement fees but does not declare a specific amount. Therefore, post-judgement fees can only be awarded upto the difference between the pre-judgement fees and the limit. Because pre-judgement fees exceed the limit, no post-judgement fees are awarded.

03/06/00

Fees updated as per amended judgement.

POST JUDGEMENT COSTS COMMENT

Comments Page: 001 UserID: ewebster

Total post-judgement costs for related claims $32 for service of Supp Order (pg 33). That amount is allocated based on qualified services ($14.28 for this claim). Additionally, Claimant provided documenation of $5 for costs related solely to this claim. Aggregate amount of costs awarded.

POST JUDGEMENT INTEREST COMMENT

Comments Page: 001 UserID: ewebster

All allowable interest included above.

========== DISPOSITION CHECKLIST ==========

CLAIM DENIED: Yes
Amount Denied: 4,667.30
Division Order Date: 11/09/1999
Department Order Date: 02/28/2000
Appeal Deadline to Dept.: 12/09/1999
Appeal Deadline to Courts.:

Status on Appeal: Remanded	
Status on Appeal - CT: ?	
AG Subrogation Referal Date:	
Date Judgement Assigned to DOPL:	
Amount Collected in Subrogation	
Costs:	0.00
Fees:	0.00
Interest:	0.00
Civil Penalty:	0.00
Interest:	0.00
Total:	0.00
Status of Subrogation:	
Payment Request Date:	
Finet Document Number:	
Finance Transaction Date:	
NPP Reimbursement Demand Date:	
NPP Reimbursement Deadline Date:	
Date Reimbursement Received:	
Amount: 0.00	
Date Investigation Report Updated:	
Status of Investigation:	

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

IN THE MATTER OF THE LIEN RECOVERY FUND CLAIM OF **COLUMBIA MECHANICAL PLUMBING & HEATING, INC.**, REGARDING THE CONSTRUCTION BY **PRP DEVELOPMENT, LC** BUILDERS, ON THE RESIDENCE OF **WILLIAM & MICHELLE CLAYTON**	:	**ORDER** Claim No. LRF-1999-0915-02

Pursuant to the requirements for a disbursement from the Lien Recovery Fund set forth in UTAH CODE ANN. § 38-11-203(3) (1998), and being apprized of all relevant facts, the Director of the Division of Occupational and Professional Licensing finds that, by failing to file a claim application with the Residence Lien Recovery Fund within 120 days from the date the judgement **against the nonpaying party** required by UTAH CODE ANN. § 38-11-204-(3)(c) (1998) was entered, the Claimant has not complied with the requirements of UTAH CODE ANN. § 38-11-204(2) (1998). Specifically, the judgement against the nonpaying party required by UTAH CODE ANN. § 38-11-204-(3)(c) (1998) was entered on April 7, 1999, and the Claimant filed its claim with the Residence Lien Recovery Fund on September 15, 1999, or 161 days after the judgement against the nonpaying party was entered.

In its response to the Division's Notice of Incomplete or Insufficient Claim Application, asserts the 120-day deadline is "tolled by the discovery rule." In support of this position, Claimant cites *Klingler v Kightly* 791 P2.d 868 and Utah Code Ann. § 78-12-41. The Director finds the "discovery rule" inapplicable to this case.

Klinger references to *Myers v. McDonald* 635 P2.d 84, wherein the Utah Supreme Court established a three-part balancing test for determining the applicability of the discovery rule. That test requires the plaintiff must prove all of the following for the discovery rule to apply:

1. the legislature has adopted the rule by statute;
2. there is proof of concealment or misleading by the defendant; and
3. application of the general statute of limitation rule would be irrational or unjust.

Claimant has failed to meet this test; therefore the discovery rule does not apply. Specifically, the first provision is not met because the legislature has not adopted the discovery rule as part of Utah Code Title 38, Chapter 11. Had the legislature intended discovery to apply, Utah Code Ann. § 38-11-204(2) would include language to the effect "(d) except that the cause of action in such a case does not accrue until the discovery by the Claimant of all relevant facts." No such language has been adopted by the legislature.

Claimant fails to meet the second provision because it has presented no evidence the Division or the Fund's personnel concealed relevant facts or mislead Claimant. To be consistent with Claimant's interpretation of the discovery rule, the Fund must be treated as the defendant in the claim. Therefore, unless Claimant can prove the Fund and/or the Division concealed relevant facts, the second provision of the test is not met.

The third provision of the test is not addressed here because Claimant's failure to meet the first two provisions renders the status of the third irrelevant. Failure to meet any one provision means the discovery rule does not apply.

Claimant's assertion of Utah Code Ann. § 78-12-41 is equally inapplicable. That section provides: "When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." Claimant asserts that its inability to get needed information from the homeowners, who were not named in the lawsuit against the nonpaying party, prevented the timely filing of the claim. However, Claimant was in no way **stayed** from filing a timely claim. Rather, Claimant could have followed the common practice of naming the homeowners as codefendants in the lawsuit against the nonpaying party and thereby procured the information needed to file the claim at

the same time as getting the judgement against the nonpaying party. Claimant's failure to act to gather information in an expeditious manner does not constitute a stay by injunction or statutory provision.

WHEREFORE, the Director of the Division of Occupational and Professional Licensing orders that the above-encaptioned claim is denied.

DATED this 9 day of November, 1999.

A. Gary Bowen, Director

CHALLENGE AFTER DENIAL OF CLAIM:
Under the terms of UTAH ADMINISTRATIVE CODE, § R156-46b-202(j) (1996), this claim has been classified by the Division as an informal proceeding. Claimant may challenge the denial of the claim by filing a request for agency review. **(Procedures regarding requests for agency review are attached with Claimant's copy of this Order)**.

MAILING CERTIFICATE

I hereby certify that on the 15 day of November, 1999, a true and correct copy of the foregoing Order was sent first class mail, postage prepaid, to the following:

DAVID BARLOW — Claimant
COLUMBIA MECHANICAL PLUMBING & HEATING
7175 W 3995 S
SALT LAKE CITY UT 84128-8008

F. MARK HANSEN — Counsel for Claimant
431 N 1300 W
SALT LAKE CITY UT 84116-2630

PRP DEVELOPMENT, LC — Non-Paying Party
7069 HIGHLAND DR STE 250
SALT LAKE CITY UT 84121

DAVID O. BLACK — Counsel for Non-Paying Party
BLACK, STITH, & ARGYLE, PC
5806 S 900 E
SALT LAKE CITY UT 84121-1644

Kathie K Schwab
Kathie Schwab, Board Secretary

F. Mark Hansen, #5128
F. Mark Hansen, P.C.
431 North 1300 West
Salt Lake City, Utah 84116
Telephone: (801) 403-8279
Attorney for Columbia Mechanical Plumbing & Heating

UTAH DEPARTMENT OF COMMERCE
DOUGLAS C. BORBA, EXECUTIVE DIRECTOR

IN THE MATTER OF THE LIEN RECOVERY FUND CLAIM OF **COLUMBIA MECHANICAL PLUMBING AND HEATING, INC.**, REGARDING THE CONSTRUCTION BY **PRP DEVELOPMENT, LC**, BUILDERS, ON THE RESIDENCE OF **WILLIAM & MICHELLE CLAYTON**	**REQUEST FOR AGENCY REVIEW** Claim No. LRF-1999-0915-02

Columbia Mechanical Plumbing & Heating, Inc. requests agency review of the November 9, 1999 Order of the Division of Occupational and Professional Licensing (DOPL), denying Columbia's claim on the Residential Lien Recovery Fund for work Columbia performed as a subcontractor for PRP Development on a residence of William and Michelle Clayton. A copy of the Order is attached as Exhibit 1.

DOPL denied Columbia's claim on the sole ground the claim was barred by U.C.A. §38-11-204(3)(c), because Columbia filed its claim more than 120 days after entry of the judgment against PRP. DOPL erred in finding U.C.A. §§38-11-204(3)(d) and §78-12-41, and the "discovery rule, inapplicable, by ignoring or misinterpreting facts and misapplying the law dealing with tolling of statutes of limitations.

I. COLUMBIA'S CLAIM IS TIMELY UNDER U.C.A. §§38-11-204(3)(d) & 78-12-41.

DOPL's first error is one of law, to which the agency on appeal gives no deference. U.C.A. §38-11-204(3)(d) is a statutory bar to a beneficiary filing a residential lien recovery fund claim as long as the beneficiary is "entitled to reimbursement from any other person." U.C.A. §78-12-41 provides, "When the commencement of an action is stayed by ... a statutory prohibition, the time of the continuance of the ... prohibition is not part of the time limited for the commencement of the action." Columbia named the Claytons as codefendants on a mechanics lien

claim based on the evidence then in Columbia's possession. [Complaint, copy attached to Claim] As of July 6, 1999 (90 days from Columbia's judgment against PRP), Columbia even had a judgment against the Claytons on its mechanics lien claim. [10/26/99 response to DOPL, Ex. 2] At that time, then, Columbia was "entitled to reimbursement" from the Claytons, U.C.A. §38-11-204(3)(d) was a statutory prohibition against Columbia commencing its claim, and U.C.A. §78-12-41 tolled the filing of Columbia's claim. Throughout the period Columbia had a claim for reimbursement through its mechanics lien, Columbia was entitled to reimbursement from another person, and U.C.A. §38-11-204(3)(d) was a statutory prohibition that stayed Columbia from commencing its Claim. Therefore, by statute, the time before dismissal of Columbia's mechanics lien action against the Claytons "is not part of the time limited for the commencement" of its Claim. On August 16, 1999, the date of the Clayton's cover letter that for the first time provided evidence supporting a claim against the Residential Lien Recovery Fund and thereby negating Columbia's mechanics lien claim. Therefore, under U.C.A. §§38-11-204(3)(d) and 78-12-41, the time for Columbia to file its claim commenced no sooner than August 16, 1999. Columbia dismissed its mechanics lien action and timely filed its Claim only three weeks later.

II. THE LIMITATION PERIOD WAS TOLLED BY THE DISCOVERY RULE.

DOPL's next error is also one of law. The discovery rule tolls the statute of limitations when a plaintiff "did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period." Harper v. Summit County, 963 P.2d 768, 776 (Utah App. 1998). Citing Myers v. McDonald, 635 P.2d 84 (Utah 1981). DOPL ruled Columbia "must prove all of the following for the discovery rule to apply:

1. the legislature has adopted the rule by statute;
2. there is proof of concealment or misleading by the defendant; and
3. application of the general statute of limitation rule would be irrational or unjust."

DOPL misapplied the law. Myers recognized three separate exceptions to a statute of limitations, any one of which would toll the statute:

> There are a number of exceptions to this general rule. In some enumerated areas of the law, our Legislature has adopted the discovery rule by statute so that the limitations period does not begin to run until the discovery of facts forming the basis for the cause of action. In other circumstances, where the statute of limitations would normally apply, this Court has held that proof of concealment or misleading

> by the defendant precludes the defendant from relying on the statute of limitations. This is plaintiffs' second theory in this case. Finally, without regard to proof of wrongdoing on the part of the defendant, the courts of some states have adopted the discovery rule by judicial action as to exceptional circumstances or causes of action where the application of the general rule would be irrational or unjust.

Id., 635 P.2d at 86. Myers itself applied the discovery rule based solely on the second exception (concealment by the defendant). DOPL was simply wrong as a matter of law in holding Columbia must prove all three exceptions in order to invoke the discovery rule.

A. Applying the General Limitation Would Be Unjust.

Because DOPL incorrectly concluded Columbia had to meet all three exceptions, DOPL erred by failing even to consider whether the third Myers exception applies to Columbia. ("The third provision of the test is not addressed here because Claimant's failure to meet the first two provisions renders the status of the third irrelevant.") The agency should hold the third exception applies:

> One of three situations in which the discovery rule applies is "where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action." ...
> "The ultimate determination of whether a case presents exceptional circumstances that render the application of a statute of limitations irrational or unjust' [turns on] a balancing test." In applying the balancing test, the court "weighs the hardship imposed on the claimant by the application of the statute of limitations against any prejudice to the defendant resulting from the passage of time.

Harper v. Summit County, 963 P.2d 768, 776 (Utah App. 1998) (citations omitted). Even without proof of tolling by statute or concealment, U.C.A. §38-11-204(3)(c) should be tolled because this case presents exceptional circumstances as set forth above. Application of the general rule would not only be unjust, it would likely violate Columbia's rights under the open courts provision of the Utah Constitution, by barring Columbia from recovery before it could discover its right to recovery even existed, while providing no alternate remedy. Article I Section 11 provides:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

In Velarde v. Board of Review of Indus. Com'n of Utah, 831 P.2d 123, 126 (Utah App. 1992) the Court discussed the application of the open courts provision:

> ... the section imposes serious limits on the legislature's power to deny plaintiffs their existing common law rights and remedies.
>
> > [The] basic purpose of Article I, section 11 is to impose some limitation on [the legislature's power to create new rules of law and abrogate old ones] for the benefit of those persons who are injured in their persons, property, or reputations since they are generally isolated in society, belong to no identifiable group, and rarely are able to rally the political process to their aid.
>
> [*citation omitted*] The supreme court has adopted a two-part test which contemplates both the individual rights constitutionally protected by the open courts provision and the legislative interest in promoting the social and economic welfare.
>
> First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different....
>
> Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

Applying this two part test, the Residential Lien Recovery Act does not provide Columbia with "an effective and reasonable alternative remedy." In fact, the Act on its face prohibits all other remedies. Columbia's problem arises because at the time U.C.A. §38-11-204(3)(c) would have required Columbia from filing its claim, U.C.A. §38-11-204(3)(d) specifically prohibited Columbia from filing its claim, because at the time Columbia was "entitled to reimbursement from any other person," the Claytons. Second, there is no " clear social or economic evil to be eliminated" by allowing Columbia its claim. The very existence of the Residential Lien Recovery Fund is for the purpose of satisfying claims such as Columbia's. A claim cutoff date of 120 rather than, say, 180 days, from obtaining a judgment against Columbia's debtor, is an arbitrary time period. Therefore, under the two-part test described in Velarde, using U.C.A. §38-11-204(3)(c) to bar Columbia's claim would violate Article I Section 11 of the Utah Constitution.

"The governing policy in this area, as declared by the United States Supreme Court, is that statutes of limitations 'are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' " Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981) (*quoting* Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944)).

> In this case, the policy against stale claims is also outweighed by the unique circumstances of plaintiffs' hardship. Defendant cannot establish that he was prejudiced by having to defend a stale claim since his problems of proof occasioned

> by the delay are no greater than the plaintiffs'. In contrast, plaintiffs could not file an action for damages or even initiate investigative efforts to determine the cause of a death of which they had no knowledge. (FN8) Plaintiffs therefore had no alternative other than to bring their action after the statutory limitation period had expired. If plaintiffs are denied the opportunity of proceeding with that action, the law would be in the untenable position of having created a remedy for plaintiffs and then barring them from exercising it before they had any practical opportunity to do so.

Myers at 87. Here, DOPL is not prejudiced by having to "defend a stale claim." Indeed, DOPL's substantive role is not to "defend" a claim at all, merely to assure that Columbia has a right to recovery on the merits, i.e., that the Claytons paid PRP its contract price in full, and that PRP did not pay Columbia. In contrast, Columbia could not file a claim of which it had no knowledge. Columbia therefore had no alternative other than to bring their claim after the statutory period had expired. If Columbia is the opportunity of proceeding, the law would be in the untenable position of having created a remedy for Columbia and then barring it from exercising it before they had any practical opportunity to do so. The Myers Court says this would be an unacceptable result, and is grounds for tolling U.C.A. §38-11-204(3)(c).

B. The Discovery Rule Has Been Adopted by Statute.

The first Myers test also applies. *See* Point I *supra*, incorporated here by reference.

C. The Discovery Rule Applies Because of PRP's and the Clayton's Concealment of the Facts.

The second Myers exception applies as well. The facts Columbia needed to file its claim were within the exclusive control of PRP and the Claytons. DOPL erred by ruling "Claimant could have followed the common practice of naming the homeowners as codefendants in the lawsuit against the nonpaying party and thereby procured the information needed to file the claim at the same time as getting the judgment against the nonpaying party." DOPL ignored the fact that Columbia not only did "name the homeowners as codefendants," it obtained its judgment against PRP as a discovery sanction, for PRP's failure to obey a court order compelling discovery Columbia served, which if PRP had answered would have disclosed the facts Columbia needed to bring its claim. [Order and Judgment, copy attached to Claim.] Thus, PRP actively concealed the facts.

DOPL also ignored the facts that Columbia did "follow the common practice" and named the homeowners as codefendants. [Complaint, copy attached to Claim]. The Claytons failed to

defend, and Columbia even obtained a default judgment against the Claytons to foreclose Columbia's mechanic's lien. [10/26/99 Response to DOPL, Ex. 2] When the Claytons succeeded in having the default judgment set aside, Columbia then moved for judgment on the pleadings against the Claytons. [10/26/99 Response to DOPL, Ex. 3] It was only in response to that motion that the Claytons finally produced the facts Columbia needed to file its Claim. Thus, the Claytons actively concealed the facts until more than 120 days after Columbia obtained its judgment against PRP. DOPL's ruling that Columbia could have timely "procured the information needed to file the claim" by naming the Claytons as defendants was pure speculation, arbitrary and capricious, and contradicted by the facts.

DOPL erred in ruling, "Tao be consistent with Claimant's interpretation of the discovery rule, the Fund must be treated as the defendant in the claim. Therefore, unless Claimant can prove the Fund and/or the Division concealed relevant facts, the second provision of the test is not met." The trouble with DOPL's approach is that the Fund is not an entity, but a monetary pool supported solely by assessments, fees and fines paid by the construction community, of which PRP was a part. U.C.A. §38-11-202. A claim is brought against the Fund, not against DOPL. U.C.A. §38-11-106. DOPL's involvement is that of agent to administer the fund for its principals in the construction community. U.C.A. §38-11-201. A claim against the fund is a statutory substitute for a mechanics' lien claim to save an owner from double payment in instances where an owner has paid his general contractor in full, by shifting the risk, not to the state, but to the construction community who paid into the fund. U.C.A. §§38-11-107, -203, -204. If a payment is made from the Fund, DOPL is entitled to recover the payment from the general contractor by right of subrogation, U.C.A. §38-11-205, as would an owner against his general contractor. A claim against the Fund is analogous to a claim against the owner who would otherwise be liable on a mechanics' lien claim, or against the general contractor who failed to pay its subcontractor. Therefore, concealment by the general contractor and/or owner triggers the second "discovery rule" exception. Since both PRP and the Claytons concealed the facts Columbia needed to file its claim, the discovery rule applies.

CONCLUSION

Based on the above, the agency should reverse DOPL's Order, and direct the payment of Columbia's claim against the Residential Lien Recovery Fund.

DATED December 8, 1999.

Attorney for Columbia Mechanical

CERTIFICATE OF SERVICE

I certify on December 8, 1999 duplicate originals of the above were served by first-class mail and by fax to:

Douglas C. Borba
Executive Director
Utah Department of Commerce
Heber M. Wells Building
160 East 300 South / Box 146701
Salt Lake City, Utah 84114-6701
fax no. (801) 530-6001

6671p.101

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

IN THE MATTER OF THE LIEN RECOVERY FUND CLAIM OF **COLUMBIA MECHANICAL PLUMBING & HEATING, INC.** REGARDING THE CONSTRUCTION BY: **PRP DEVELOPMENT, LC** ON THE RESIDENCE OF **WILLIAM & MICHELLE CLAYTON** LOCATED AT **7175 WEST 3995 SOUTH, WEST VALLEY CITY, UTAH 84128**:	**ORDER** Claim No. LRF-1999-0915-02

Pursuant to the requirements for a disbursement from the Residence Lien Recovery Fund set forth in UTAH CODE ANN. § 38-11-203(1) (1998) the Director of the Division of Occupational & Professional Licensing of the State of Utah, being advised by the Residence Lien Recovery Fund Board and being apprized of all relevant facts finds that:

1. The claimant was a qualified beneficiary during the construction on a residence;

2. The claimant complied with the requirements of UTAH CODE ANN. § 38-11-204; and

3. There is adequate money in the fund to pay the amount ordered.

WHEREFORE, the Director of the Division of Occupational & Professional Licensing orders that the above-encaptioned claim is payable from the Residence Lien Recovery Fund, and that Claimant be paid $2,485.00 for qualified services, plus $143.20 in pre-judgment costs, $1,108.10 in pre-judgment attorney fees, $19.28 in post-judgment costs, $2,399.05 in post-judgment attorney fees, and $565.35 in interest for a total claim of $6,719.98.

The Director of the Division of Occupational and Professional Licensing also orders that $96.10 of the amounts claimed in the above-encaptioned claim be denied. The specific amounts denied

and reasons for denial are as follows: $86.90 for qualified services exceeding the amount verified by documentation, $5.01 for pre-judgment costs incorrectly allocated among related claims, and $4.19 for post-judgment costs incorrectly allocated among related claims.

DATED this 17 day of March, 2000.

A. Gary Bowen, Director

CHALLENGE AFTER DENIAL OF CLAIM:
Under the terms of UTAH ADMINISTRATIVE CODE, § R156-46b-202(j) (1996), this claim has been classified by the Division as an informal proceeding. Claimant may challenge the denial of the claim by filing a request for agency review. **(Procedures regarding requests for agency review are attached with Claimant's copy of this Order).**

MAILING CERTIFICATE

I hereby certify that on the 20 day of March, 2000, a true and correct copy of the foregoing Order was sent first class mail, postage prepaid, to the following:

DAVID A BARLOW — Claimant
COLUMBIA MECHANICAL PLUMBING & HEATING
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HERRIMAN UT 84065-6526

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Kathie Schwab

Kathie Schwab, Program Secretary